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Office Supreme Court, U.S.
FILED
DEC 26 1961
JOHN F. DAVIS, CLERK

# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1961**

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## No. 128

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JOHN T. GOJACK,

*Petitioner,*

vs.

UNITED STATES OF AMERICA.

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## REPLY BRIEF FOR PETITIONER

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This brief is submitted pursuant to leave of the Court.

1. In enacting the 1857 statute (11 Stat. 155), Congress sought primarily to provide for punishment which would survive the end of a legislative session. It did not seek to extend in other ways—if, indeed, under the Constitution it could have done so—the scope of its power to compel testimony. Punishment for contempt continued to be restricted to witnesses who obstructed legitimate legislative aims.

In the debate preceding the passage of the 1857 statute, Senator Seward objected to the broad language of the bill, saying:

> "* * * it may be a subject over which Congress has no jurisdiction. It may be foreign from all the provisions of the Constitution; it may be a local question; it may be a State question; it may be a personal question; it is not necessarily a public question."

In response, Senator Bayard countered:

> "I am aware that legislative bodies have transcended their powers—that under the influence of passion and political excitement they have very often invaded the rights of individuals, and may have invaded the rights of coordinate branches of the Government, but if our institutions are to last, there can be no greater safeguard than will result from transferring that which now stands on an indefinite power (the punishment as well as the offense resting in the breast of either House) from Congress to the courts of justice. When a case of this kind comes before a court, will not the first inquiry be, have Congress jurisdiction of the subject-matter?—has the House which undertakes to inquire, jurisdiction of the subject? If they have not, the whole proceedings are *coram non judice* and void, and the party cannot be held liable under indictment. The court would quash the indictment if this fact appeared on its face; and if it appeared on the trial they would direct the jury to acquit." Cong. Globe, 34 Cong., 3d Sess. (1857) 439-440.

In the first major court test of Congressional investigating power, the Court, in *Kilbourn* v. *Thompson*, 103 U.S. 168, adopted Senator Bayard's view that the investigating function and contempt powers of Congress are to be subjected to intensive judicial scrutiny.

2. The Government presses upon the Court the ruling in the *Barenblatt* case (360 U.S. at 132) that:

> "So long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power."

But this ruling must be applied to the facts of this case. Here, the precise issue is whether Congress acted in pursuance of its constitutional power. The Court certainly did not rule in *Barenblatt* that a colorable claim of legislative purpose could not be refuted or rebutted. On the contrary, it indicated that such a claim could be refuted in a number of ways, including proof that the investigation had assumed law enforcement functions.

3. If, as we contend, either the purpose of breaking the Union or exposing petitioner can be fairly attributable to the Committee, then it seems obvious that the conviction must be reversed. Moreover, even if one purpose of the Committee was legitimate and another improper, that is, non-legislative, the conviction must be reversed. This is so for two separate reasons. In the first place, a legislative tribunal which is inspired in part by an improper purpose is incompetent. It has no power to proceed under Article I, Section 1 of the Constitution. And even if this were not so, the Court would have no way of knowing whether the questions which gave rise to the indictment were asked in pursuance of a proper or improper purpose.

4. The Government places heavy reliance on Congressman Moulder's statement at the commencement of the hearing. But the arguments in the pending cases under Section 192 should serve to convince the Court that a statement of investigative subject matter is a treacherous guide to the purpose of the Committee. Where the subject matter is one upon which Congress may legislate, it creates only a presumption or inference of a legitimate purpose.

5. Obviously, Congressman Moulder's statement cannot bind the Court in the light of the other evidence in the record. We lay particular stress, as we did in our main brief, on the fact that we are dealing with a series of acts

and statements by the *Chairman* of the Committee about this very case. The Chairman is beyond peradventure authoritative where, as here, *no Committee resolution is relied on to controvert it.*

Under the Rules of the Committee (Rule 3), the Chairman is responsible for the issuance of subpoenas. He created the subcommittee (R. 60). Under the Rules of the House, he is regarded as the responsible head of the Committee. See Jefferson's *Manual*, Sections 317, 343, 415, 418, 672. To ignore the course of statements and acts by Chairman Walter in determining whether or not the Committee had a legislative purpose, would mutilate the record. It would, indeed, artificially impose on the investigative process rules of interpretation which are totally alien to it. The entire environment of the investigative process, its historical *milieu*, make it glaringly clear that the Chairman of an investigating committee is *the* authoritative voice in determining its purpose and scope.

6. Contrary to the Government's contention that the newspaper clippings upon which we rely are ineffective to prove purpose, we assert that they are peculiarly probative of exposure. If Congressman Walter had merely issued a press release stating that "we" intend to break the union and to demonstrate that petitioner is a card-carrying Communist upon whom the community is free to take reprisal, such a press release would be a powerful demonstration of the Committee's purpose. Here, the Chairman went beyond issuing a press release; he instigated the actual publication of the same information in a newspaper clipping in the very communities where the injury was to be done. In short, the newspaper clippings are not only evidence of legitimate purpose, but an actual attempt to carry out that purpose. This attempt is, quite apart from the announcement of the Committee's purpose,

independent evidence of the impropriety of the reasons for calling petitioner.

7. The Government argues that the Committee did not know that the Magnavox election was pending. Petitioner sought at the trial to adduce the evidence of Personnel Manager McClaren of the Magnavox Company to show that he knew that petitioner would be called three days before the public announcement that he would be called (Main Brief, p. 56). The obvious purpose of this line of testimony was to demonstrate that the Committee *did* know of the pendency of the election and was in touch with McClaren about the hearing. Under these circumstances, it seems plain to us that the refusal of the trial court to admit this evidence was improper.

8. We have contended that the indictment is insufficient because it fails to specify the matter under inquiry (Main Brief, p. 59). The Court has raised the question in the course of the argument in No. 8 (*Russell* v. *United States*) whether a bill of particulars would not cure this claimed defect. A demand for a bill of particulars was made in the instant case and included the following request: "In what manner was each question set forth in the indictment pertinent to the questions then under inquiry?" This request was denied (R. 13).

9. Petitioner's main brief contains a typographical error which may mislead the Court. Petitioner was sentenced to nine months in prison and a fine of $250, not $2,000, as the brief (at p. 16) erroneously states.

Respectfully submitted,

FRANK J. DONNER,
DAVID REIN,
*Attorneys for Petitioner.*